

RECENT DEVELOPMENTS IN TEXAS PROBATE LEGISLATION

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RECENT DEVELOPMENTS IN TEXAS PROBATE LEGISLATION¹

This article reviews legislation enacted by the 2001 Texas Legislature relating to the Texas law of intestacy, wills, estate administration, trusts, guardianship, and other estate planning matters. The reader is warned that not all recent legislation is presented and not all aspects of each cited statute are analyzed. You must read and study the full text of the legislation before relying on it or using it as authority.²

I. INTESTACY

A. Determination of Father

The legislature enacted the Uniform Parentage Act. Fam. Code ch. 160. [77th Leg., R.S., ch. 821 ([H.B. 920](#)), effective immediately.] In so doing, conforming amendments were made to Probate Code § 42(b) which now refers to the new Act's provisions for determining when a child may inherit from an alleged father. The process formerly known as executing a "statement of paternity" is now called an "acknowledgment of paternity."

B. Determination of Paternity of Children of Assisted Reproduction

The former Family Code provisions relating to the assisted reproduction were repealed and new rules substituted. [77th Leg., R.S., ch. 821 ([H.B. 920](#)), effective immediately.] The new rules, however, are not comprehensive. For example, they do not address situations where unmarried persons use assisted reproduction, married persons use assisted reproduction but fail to document their consent in writing, or gestational agreements.³

¹ © 2001 Gerry W. Beyer. All rights reserved. The author would like to express his appreciation to the M.D. Anderson Foundation for its generous support of the research required to prepare this article.

² Each bill is hyperlinked to the text of the enrolled legislation as posted on [Texas Legislature Online](#). You may also want to visit <http://www.texasprobate.com/01leg/master.htm>. This outstanding site is maintained by Mr. Glenn Karisch of the law firm of Barnes & Karisch, P.C. in Austin.

³ H.B. 1246 which would have addressed gestational agreements was left pending in the House Juvenile Justice and Family Issues Committee.

1. Donor Not Parent

The donor of the sperm, egg, or other biological material is not a parent of a child conceived by means of assisted reproduction. Fam. Code § 160.702.

2. When Husband is Parent

A husband is considered the father if he (1) provides sperm, (2) consents to the assisted reproduction in a record signed by both the husband and his wife, or (3) is found by the court to be the father because the husband and wife openly treated the child as their own. Fam. Code § 160.703. Procedures for the husband to dispute paternity are also provided. Fam. Code § 160.705.

3. Effect of Dissolution of Marriage

If the marriage is dissolved before the placement of eggs, sperm, or embryos, the former spouse is not the parent of the resulting child unless the former spouse consented in a record that if assisted reproduction were to occur after a divorce, the former spouse would still be a parent of the child. A former spouse may withdraw an advance consent in a record at any time before the placement of eggs, sperm, or embryos. Fam. Code § 160.706.

4. Effect of Death

If a spouse dies before the placement of eggs, sperm, or embryos, the deceased spouse is not a parent of the resulting child unless the deceased spouse consented in a record that if assisted reproduction were to occur after death, the deceased spouse would still be a parent of the child. Fam. Code § 160.707.

II. WILLS

A. Void Gifts

The categories of individuals to whom an attorney may leave a client's property without having the gift automatically voided by statute have been increased. Gifts may now be made to the following individuals: (1) the testator's spouse, (2) any ascendant of the testator, (3) any descendant of the testator, and (4) any person related within the third degree to the testator, either by blood or marriage. Under the former version of this statute, only gifts to persons within the second degree of consanguinity or affinity were

excepted. Prob. Code § 58b(b). [77th Leg., R.S., ch. 527 ([H.B. 2152](#)), § 1, applicable only to a will executed on or after June 11, 2001.]

B. Class Gift Membership Determination

The determination of paternity provisions of the new Uniform Parentage Act will impact the determination of the recipients of class gifts (e.g., a gift to “my children” or “my grandchildren”) especially with respect to children resulting from assisted reproduction. See the discussion in § I(B), above.

III. ESTATE ADMINISTRATION

A. Jurisdiction

As a general rule, a judge of a statutory probate court who has jurisdiction over a suit pending in one county may now conduct any of the judicial proceedings in a different county. However, there are two exceptions. The judge may not conduct the proceedings in a different county if (1) any party objects or (2) the trial is on the merits. Gov’t Code § 25.0022(o). [77th Leg., R.S., ch. 64 ([H.B. 538](#)), § 1, effective September 1, 2001.]

B. Filing of Probate Action

If a county has a statutory probate court, filing is now mandatory in that court. There is no longer a choice between filing in the statutory probate court and the constitutional county court if the county has a statutory probate court. Prob. Code § 5(d) [77th Leg., R.S., ch. 63 ([H.B. 536](#)), § 1, applicable only to a proceeding that is instituted on or after September 1, 2001.]

C. Transfer

1. Transferring Case Back to Another County

A statutory probate court dealing with a decedent’s estate may now transfer the case back to the court it came from if jurisdiction is lost even if that court is in another county. The court did not previously have this ability because the prior version of the statute required the transferee court to be in the same county as the transferor court. Gov’t Code § 25.00221(b). [77th Leg., R.S., ch. 64 ([H.B. 537](#)), § 1, applicable only to a cause of action filed on or after September 1, 2001.]

2. *Power of Visiting Statutory Probate Court Judge*

A visiting statutory probate court judge now has the power to make transfers under Probate Code § 5B. Gov't Code § 25.0022(n). [77th Leg., R.S., ch. 468 ([H.B. 534](#)), § 1, effective September 1, 2001.]

D. Determination of Heirship

1. *Mandatory Appointment of Attorney ad Litem*

The court is now required to appoint an attorney ad litem to represent the interests of unknown heirs in every heirship proceeding. The appointment of an attorney ad litem is no longer discretionary with the court. Prob. Code §§ 53(c) & 34A. [77th Leg., R.S., ch. 664 ([H.B. 2731](#)), §§ 1 & 3, applicable only to an application for determination of heirship filed on or after September 1, 2001.]

2. *Mandatory Service by Publication on Unknown Heirs*

The Legislature clarified the notice requirements by requiring citation to be served by publication on unknown heirs in all heirship determinations. The purpose of the service is to determine whether there are any other heirs; a suspicion of the existence of unknown heirs is not a prerequisite to the duty to serve citation by publication. Prob. Code § 50(b). [77th Leg., R.S., ch. 664 ([H.B. 2731](#)), § 2, applicable only to an application for determination of heirship filed on or after September 1, 2001.]

3. *Limitation of Waiver of Citation*

A parent, managing conservator, guardian, attorney ad litem, or guardian ad litem of a distributee who is at least 12 years old but younger than 19, may not waive the requirement that citation be served on the distributee in a determination of heirship proceeding. Prob. Code § 50(e). [77th Leg., R.S., ch. 664 ([H.B. 2731](#)), § 2, applicable only to an application for determination of heirship filed on or after September 1, 2001.]

E. Muniment of Title

An application to probate a will as a muniment of title no longer must contain the social security numbers of the applicant and the decedent. Prob. Code § 89A(a). [77th Leg., R.S., ch. 10 ([S.B. 723](#)), § 1, applicable only to an application to probate a will as a muniment of title filed on or after September 1, 2001.]

F. Right of Personal Representative if No Community Administrator Has Qualified

The terms “executor” and “administrator” were replaced with the term “personal representative” in the statute describing the management powers which the personal representative of a deceased spouse has when no community administrator has qualified. The change in terminology makes it clear that these powers exist regardless of whether the deceased spouse died testate or intestate. Prob. Code § 177(b). [77th Leg., R.S., ch. 10 ([S.B. 723](#)), § 2, effective with regard to the estate of a decedent who dies on or after September 1, 2001.]

G. Claim for Economic Contribution and Reimbursement

The 2001 Legislature overhauled the Family Code provisions which provide the contributing spouse’s marital estate with a claim for economic contribution from the benefited spouse’s marital estate. Fam. Code §§ 3.401-3.3.410. [77th Leg., R.S., ch. 838 ([H.B. 1245](#)), § 6, effective September 1, 2001.] Economic contribution is also available in a divorce context; these rules are not summarized in this article.

1. Amount of Claim

A marital estate that makes an economic contribution to property owned by another marital estate has a claim for economic contribution with respect to the benefited estate. Fam. Code § 3.403(a). This claim does not create an ownership interest in the property nor does it affect the right to manage, control, or dispose of marital property. The claim matures when the first spouse dies. Fam. Code §§ 3.404(b) & § 3.405.

a. Expenditures Considered as Economic Contributions

The following expenditures are treated as economic contributions:

- The reduction of the principal amount of a debt secured by a lien on property owned before marriage, to the extent the debt existed at the time of marriage.
- The reduction of the principal amount of a debt secured by a lien on property received by a spouse by gift, devise, descent during a marriage, to the extent the debt existed at the time the property was received.
- The reduction of the principal amount of that part of a debt (including a home equity loan) which is (a) incurred during a marriage, (b) secured by a lien on property, and (c) incurred for the acquisition of, or for capital improvements to, property.

- The reduction of the principal amount of that part of a debt (a) incurred during a marriage, (b) secured by a lien on property owned by a spouse, (c) for which the credit agreed to look for repayment solely to the separate marital estate of the spouse on whose property the lien attached, and (d) incurred for the acquisition of, or for capital improvements to, property.
- The refinancing of the principal amount of the above four types of debts to the extent the refinancing reduces that principal amount in a manner as described in the above four situations.
- Capital improvements to property other than by incurring debt.

Fam. Code § 3.402(a).

b. Expenditures and Contributions not Considered as Economic Contributions

The following expenditures and contributions are not considered as economic contributions and are thus not considered in determining the claim amount under the new provisions:

- Ordinary maintenance and repair.
- Taxes.
- Interest.
- Insurance.
- Contribution by a spouse of time, toil, talent, or effort during the marriage.

Fam. Code § 3.402(b).

c. Equity Determination

The equity of property on a particular date is determined by subtracting the amount of a lawful lien specific to the property from the fair market value of the property. Fam. Code § 3.401(3).

d. Formula

The amount of the contributing spouse's claim is computed using the following formula:⁴

$$\text{Claim} = \text{Eq}^{\text{DOD}} * \frac{\text{EC}^{\text{CE}}}{(\text{EC}^{\text{CE}} + \text{Eq}^{\text{1stC}} + \text{EC}^{\text{BE}})}$$

Eq^{DOD} = the equity in the benefited property at the date of the spouse's death.

EC^{CE} = the economic contribution to the property by the contributing estate.

Eq^{1stC} = the equity in the property as of the later of (1) the date of the marriage or (2) the date of the first economic contribution by the contributing estate.

EC^{BE} = the economic contribution to the property by the benefited estate during the marriage.

Fam. Code § 3.403(b).

e. Special Rules

The following special rules apply in determining the amount of the claim:

- **Minimum Claim:** The amount of the claim may be less than the total of the economic contributions made by the contributing estate. However, the contributing estate will not owe funds to the benefited estate. Fam. Code § 3.403(c)
- **Maximum Claim:** The amount of the claim may not exceed the equity in the property on the date of the spouse's death. Fam. Code § 3.403(d)
- **Effect of Use and Enjoyment:** The use and enjoyment of property during the marriage for which a claim for economic contribution to the property exists does not create a claim of an offsetting benefit against the claim. Fam. Code § 3.403(e).

⁴ The author expresses his great appreciation to Mr. Jerry Frank Jones for permission to reproduce this formula which originally appeared in Jerry Frank Jones, *2001 Legislative Developments – Starting All Over Again*, in 1 STATE BAR OF TEXAS, 25th ANNUAL ADVANCED ESTATE PLANNING & PROBATE COURSE ch. 3, at 20 (2001).

- **Offsetting Claims:** The court will offset claims of one marital estate against the claims of another marital estate in a specific asset. Fam. Code § 3.407.

f. Impact on Reimbursement Claims

A claim for economic contribution does not abrogate another claim for reimbursement such as (1) payment by one marital estate of the unsecured liabilities of another marital estate and (2) inadequate compensation for the time, toil, talent, and effort of a spouse by a business entity under the control and direction of that spouse. If there is a conflict between a claim for economic contribution and a claim for reimbursement, the economic contribution claim prevails. Fam. Code § 3.408(a), (b).

The court must resolve a claim for reimbursement by using equitable principles. Included among these rules is that claims for reimbursement may be offset against each other if the court determines it to be appropriate. Fam. Code § 3.408(c).

Benefits for the use and enjoyment of property may be offset against a claim for reimbursement for expenditures to benefit a marital estate on property that does not involve a claim for economic contribution to the property. Fam. Code § 3.408(d).

The court may not recognize a marital estate's claim for reimbursement for the following expenditures:

- Payment of child support, alimony, or spousal maintenance.
- The living expenses of a spouse or child of a spouse.
- Contributions of property of a nominal value.
- Payment of a liability of a nominal amount.
- Student loan owned by a spouse.

Fam. Code § 3.409.

g. Marital Property Agreements

A valid premarital or marital property agreement, whether executed before, on, or after September 1, 1999, is effective to waive, release, assign, or partition a claim for economic contribution to the same extent the agreement would have been effective to waive, release, assign, or partition a claim for reimbursement under the law as it existed immediately before September 1, 1999, unless the agreement provides otherwise. Fam. Code § 3.410.

2. Initiation of Claim for Equitable Lien

On the death of a spouse, the following persons may ask for an equitable lien for a claim for economic contribution: (1) the surviving spouse, (2) the personal representative of the estate of the deceased spouse, or (3) any other person interested in the estate under Probate Code § 3(r). Fam. Code § 3.406(b). The equitable lien does not arise automatically; one of these parties must ask the court to impose the lien.

3. Imposition of Equitable Lien

Upon proper application, the court must impose an equitable lien on the property of the benefited marital estate to secure a claim for economic contribution by a contributing marital estate. Fam. Code § 3.406(b). Subject to homestead restrictions, the court may impose this lien on the entirety of a spouse's property in the marital estate. The lien is not limited to the item of property that benefited from the economic contribution. Fam. Code § 3.406(c).

4. Examples

See Appendix C for sample computations of economic contribution.

H. Child Support

When a parent entitled to child support dies, any undistributed child support, including support checks which the deceased parent had received but not cashed, will be paid for the benefit of the supported child. The right to payment and the checks are no longer assets of the deceased parent's estate. Creditors of the deceased parent's estate may not make a claim against the right to payment or the checks. The obligation of the parent making child support payments does not terminate merely because the caretaker parent has died. Fam. Code § 154.013. [77th Leg., R.S., ch. 1023 ([H.B. 1365](#)), § 6, effective September 1, 2001.]

I. Suit on Rejected Claims

Suits on rejected claims must be brought in the court of original probate jurisdiction in which the estate is pending. A creditor may no longer bring the suit in another court of proper jurisdiction. Prob. Code § 313. [77th Leg., R.S., ch. 10 ([S.B. 723](#)), § 3, effective with regard to the estate of a decedent who dies on or after September 1, 2001.]

J. Livestock Commission Merchants

The maximum amount a personal representative may pay to a livestock commission merchant was increased to five percent of the sale price from three percent. Prob. Code

§ 335. [77th Leg., R.S., ch. 443 ([S.B. 1407](#)), § 1, applicable only to the estate of a decedent who dies on or after September 1, 2001.]

K. Technical Corrections

1. Probate Code § 5

The language of this jurisdictional section was modernized and clarified. In addition, several existing subsections were re-lettered to accommodate the addition of subsection (d). [77th Leg., R.S., ch. 63 ([H.B. 536](#)), § 1, applicable only to a proceeding that is instituted on or after September 1, 2001.]

2. Probate Code § 93

The reference to “persons non compos mentis and minors” was modernized to “incompetent persons” in the section stating the period for contesting the probate of a will. [77th Leg., R.S., ch. 292 ([H.B. 483](#)), § 3, effective immediately.]

IV. DURABLE POWER OF ATTORNEY

A. Effect of Bankruptcy Proceeding

The authority of an agent is neither revoked nor terminated when the principal is subject to bankruptcy proceedings, either voluntary or involuntary. However, an act the agent takes with respect to the principal’s property is subject to the limitations and requirements of the federal Bankruptcy Code until a final determination is made in the bankruptcy proceeding. Prob. Code § 487A. [77th Leg., R.S., ch. 73 ([H.B. 1083](#)), § 1, September 1, 2001.]

B. Effect of Appointment of a Temporary Guardian

The appointment of a temporary guardian will no longer automatically terminate the agent’s authority. Instead, the court has the discretion to suspend the agent’s powers until the term of the temporary guardianship expires. An interested party may still apply for and receive a temporary restraining order against the agent under other applicable law. Prob. Code § 485. [77th Leg., R.S., ch. 217 ([H.B. 1132](#)), § 1, applicable only to a durable power of attorney executed by a principal for whom an application for the appointment of a guardian is filed on or after September 1, 2001.]

C. Misapplication of Agent's Property

The misapplication of the ward's property, whether it be contrary to the durable power of attorney or Texas law, now constitutes the crime of misapplication of fiduciary property if the agent intentionally, knowingly, or recklessly misapplies the property in a manner that involves substantial risk of loss to the principal. Penal Code § 32.45(a). [77th Leg., R.S., ch. 1047 ([H.B. 1813](#)), § 1, applicable only to an offense committed on or after September 1, 2001.]

D. Duty to Inform and Account

The common law duty of an agent to inform and account for the agent's actions is now codified. Prob. Code § 489B. [77th Leg., R.S., ch. 1056 ([H.B. 1883](#)), § 1, effective September 1, 2001.]

1. Elements of Duty

The agent must perform the following actions:

- Timely inform the principal of all actions taken pursuant to the power of attorney. If the agent does not do so, the agent's actions remain valid as to third parties.
- Maintain records of each of the agent's actions and decisions.
- Provide an accounting upon the agent's demand.
- Maintain all of the agent's records until they are (1) delivered to the principal, (2) released by the principal, or (3) discharged by a court.

2. Contents of Accounting

Unless the principal expressly indicates what the principal wants the agent's accounting to contain, the accounting must include the following items:

- The principal's property which has come to the agent's knowledge or into the agent's possession.
- All of the agent's actions and decisions.
- A complete account of receipts, disbursements, and other actions which includes their source and nature. Receipts of principal and income must be shown separately.

- A list of all property over which the agent has exercised control which includes a description of each asset and, if the agent knows, its current value.
- The cash balance on hand and the name of the depository where it is kept.
- All known liabilities.
- All other information and facts which are necessary to a full and definite understanding of the exact condition of the principal's property.

The agent must also provide the principal with all documentation regarding the principal's property unless the principal directs otherwise.

3. Effect of Failure to Comply With Duties

If the agent does not comply with the agent's duties within 60 days (or such longer or shorter time the principal demands or the court orders), the principal may file suit to compel the agent to (1) deliver an accounting, (2) deliver the assets, or (3) terminate the power of attorney.

4. Cumulative Nature of Rights and Remedies

The rights provided in this new section are cumulative of any other rights or remedies the principal may have at common law or under other applicable statutes.

V. GUARDIANSHIP

A. Jurisdiction

1. Conducting Proceedings in a Different County

As a general rule, a judge of a statutory probate court who has jurisdiction over a suit pending in one county may now conduct any of the judicial proceedings in a different county. However, there are two exceptions. The judge may not conduct the proceedings in a different county if (1) any party objects or (2) the trial is on the merits. Gov't Code § 25.0022(o). [77th Leg., R.S., ch. 65 ([H.B. 538](#)), § 1, effective September 1, 2001.]

2. After Guardianship Settled

The court may now continue to hear a variety of matters relating to a former ward's estate after the estate is settled because, for example, the ward dies, becomes 18 years of age, or regains capacity. Prob. Code § 606(e). [77th Leg., R.S., ch. 484 ([H.B. 1037](#)), § 1, effective September 1, 2001.] The matters which the court may continue to hear include the following:

- action against the former guardian for alleged misconduct arising from the performance of the person's duties as guardian;
- action against the former ward or guardian by a surety that is called on to perform in place of the former guardian;
- claims for compensation, expenses, court costs, and other authorized matters;
- any action relating to the final settlement, accounting, or discharge of the guardian; and
- any other matter related to or appertaining to a guardianship estate that a court exercising original probate jurisdiction is specifically authorized to hear.

B. Filing of Guardianship Action

If a county has a statutory probate court, filing is now mandatory in that court. There is no longer a choice between filing in the statutory probate court and the constitutional county court if the county has a statutory probate court. Prob. Code § 606(d) [77th Leg., R.S., ch. 63 ([H.B. 536](#)), § 2, applicable only to a proceeding that is instituted on or after September 1, 2001.]

C. Transfer

1. Transferring Case Back from Another County

A statutory probate court dealing with a ward's estate may now transfer the case back to the court it came from if jurisdiction is lost even if that court is in another county. The court did not previously have this ability because the prior version of the statute required the transferee court to be in the same county as the transferor court. Gov't Code § 25.00221(b). [77th Leg., R.S., ch. 64 ([H.B. 537](#)), § 1, applicable only to a cause of action filed on or after September 1, 2001.]

2. Power of Visiting Statutory Probate Court Judge

A visiting statutory probate court judge now has the power to make transfers under Probate Code § 608. Gov't Code § 25.0022(n). [77th Leg., R.S., ch. 468 ([H.B. 534](#)), § 1, effective September 1, 2001.]

D. Notice

Personal service that a guardianship proceeding has been filed now needs to be given to the proposed ward's spouse only if the whereabouts of the spouse are known or can be reasonably ascertained. Prob. Code § 633(c)(4). [77th Leg., R.S., ch. 940 ([S.B. 869](#)), § 1, applicable only to an application for the appointment of a guardian filed on or after September 1, 2001 and 77th Leg., R.S., ch. 1174 ([H.B. 3144, § 2](#)), applicable only to an application for the appointment of a guardian that is filed on or after September 1, 2001.]

E. Minor to Incapacitated Person

The lead time before a minor's 18th birthday during which a person may file an application for a guardianship if the minor will need a guardian after reaching 18 years of age because of incapacity was increased to 180 days from 60 days. However, the guardianship will not take effect and the guardian may not give a bond or take the oath until the ward's 18th birthday. Prob. Code § 682A(a). [77th Leg., R.S., ch. 217 ([H.B. 1132](#)), § 10, applicable only to an application for the appointment of a guardian filed on or after September 1, 2001.]

F. Declaration of Guardian By Surviving Parent

1. Effective When Surviving Parent Becomes Incompetent

The surviving parent may now designate by will or separate written declaration the person who is to become the guardian of the parent's minor children or adult incompetent children if the surviving parent becomes incompetent. Previously, the surviving parent's designation of a guardian would take effect only upon the death of the parent. The powers of this guardian terminate when a probate court enters an order finding that the surviving parent is no longer an incapacitated person. Prob. Code §§ 676(d)-(g) & 677(b)-(e). [77th Leg., R.S., ch. 217 ([H.B. 1132](#)), §§ 4-5, applicable only to a will or written declaration for the appointment of a guardian that is executed on or after September 1, 2001.]

2. Formalities

The formalities for the surviving parent's written designation appointing a guardian were revised and modernized. Prob. Code § 677A. [77th Leg., R.S., ch. 217

([H.B. 1132](#)), § 6, applicable only to a written declaration for the appointment of a guardian that is executed on or after September 1, 2001.]

a. Expanded Coverage

The formalities now apply to declarations of guardians for minor children as well as adult incapacitated children.

b. Type of Instrument

(1) Holographic

The declaration may now be written wholly in the surviving parent's handwriting. The surviving parent must sign the declaration. No witnesses are required. The declaration may be made self-proved by following the requirements of Probate Code § 60 (method of self-proving a holographic will).

(2) Attested

As under prior law, the declaration may be attested by at least two credible witnesses 14 years of age or older who are not named as a guardian in the declaration. However, the attestation must now be in the presence of the surviving parent. The declaration must be signed either by (1) the surviving parent or (2) another person under the direction of and in the presence of the surviving parent. The declaration may be self-proved; the attachment of a self-proving affidavit is no longer mandatory.

c. Statutory Form

The statutory form was revised to account for the possibility of a surviving parent's declaration taking effect when the surviving parent becomes incompetent and for the new century. The new form is reproduced in Appendix A.

3. Proof of Declaration

A new section provides the manner by which the surviving parent's declaration is proved. Prob. Code § 677B. [77th Leg., R.S., ch. 217 ([H.B. 1132](#)), § 7, applicable only to a written declaration for the appointment of a guardian that is executed on or after September 1, 2001.]

a. If Declaration is Self-Proved

If the declaration is self-proved, the court may admit the declaration into evidence without the testimony of witnesses attesting to the competency of the surviving parent and the execution of the declaration. Additional proof of the declaration's execution is not necessary. In addition, the declaration and affidavit are prima facie

evidence that the surviving parent was competent when the parent executed the declaration and that the named guardian would serve the best interests of the child.

b. If Declaration is Not Self-Proved

If a holographic declaration is not self-proved, proof is made in the same manner as a holographic will under Probate Code § 84. An attested declaration that is not self-proved is proved in the same manner as an attested written will which is produced in court under Probate Code § 84.

G. Declaration of Guardian Before the Need Arises

The formalities for a person to designate a guardian before the need arises were revised and modernized. They parallel the new requirements for a surviving parent's declaration of a guardian for a child. Prob. Code § 679. [77th Leg., R.S., ch. 217 ([H.B. 1132](#)), § 8, applicable only to a written declaration for the appointment of a guardian that is executed on or after September 1, 2001.]

1. Type of Instrument

a. Holographic

The declaration may now be written wholly in the declarant's handwriting. The declarant must sign the declaration. No witnesses are required. The declaration may be made self-proved by following the requirements of Probate Code § 60 (method of self-proving a holographic will).

b. Attested

As under prior law, the declaration may be attested by at least two credible witnesses 14 years of age or older who are not named as a guardian in the declaration. However, the attestation must now be in the presence of the declarant. The declaration must be signed either by (1) the declarant or (2) another person under the direction of and in the presence of the declarant. The declaration may be self-proved; the attachment of a self-proving affidavit is no longer mandatory.

2. Statutory Form

The dates in the statutory form were revised to reflect the new century. The new form is reproduced in Appendix B.

3. Proof of Declaration

A new section provides the manner by which the declaration is proved. Prob. Code § 679A. [77th Leg., R.S., ch. 217 ([H.B. 1132](#)), § 9, applicable only to a written declaration for the appointment of a guardian that is executed on or after September 1, 2001.]

a. If Declaration is Self-Proved

If the declaration is self-proved, the court may admit the declaration into evidence without the testimony of witnesses attesting to the competency of the declarant and the execution of the declaration. Additional proof of the declaration's execution is not necessary. In addition, the declaration and affidavit are prima facie evidence that the declarant was competent when the declarant executed the declaration and that the named guardian would serve the best interests of the declarant.

b. If Declaration is Not Self-Proved

If a holographic declaration is not self-proved, proof is made in the same manner as a holographic will under Probate Code § 84. An attested declaration that is not self-proved is proved in the same manner as an attested written will which is produced in court under Probate Code § 84.

H. Resident Agents

1. Change of Resident Agent

A new provision provides the procedure for a guardian to change its resident agent to accept service of process. The guardian may file a "Designation of Successor Resident Agent" with the court in which the guardianship proceeding is pending. This document must contain the names and addresses of the (1) guardian, (2) current resident agent, and (3) successor resident agent. The change takes effect on the date on which the guardian files the statement with the court. Prob. Code § 760A. [77th Leg., R.S., ch. 217 ([H.B. 1132](#)), § 14, applicable only to a change in designation of a resident agent made on or after September 1, 2001.]

2. Resignation of Resident Agent

A new provision provides the procedure for a resident agent to resign. The agent must give notice to the guardian and must file a "Resignation of Resident Agent" statement with the court. This document must do the following things:

- contain the name of the guardian,

- contain the guardian's most recent address known by the resident agent,
- state that notice of the resignation has been given to the guardian and that the guardian does not have a resident agent, and
- contain the date on which the resignation notice was given to the guardian.

The resident agent must send by registered mail, return receipt requested, a copy of this document to (1) the guardian at the address most recently known by the agent and (2) each part or the party's attorney or other designated representative of record. The resignation of the resident agent takes effect on the date on which the court enters an order accepting the resignation. A court may not enter an order accepting the resignation unless the agent complies with all of the stated requirements. Prob. Code § 760B. [77th Leg., R.S., ch. 217 ([H.B. 1132](#)), § 14, applicable only to a resignation of a resident agent made on or after September 1, 2001.]

I. Examination of Proposed Ward

The court must now make its determination with respect to the necessity for a physician's examination of the proposed ward at a hearing held for that purpose. The applicant must give written notice specifying the purpose and the date and time of the hearing to (1) the proposed ward and (2) the proposed ward's attorney ad litem. The applicant must give the notice at least four days before the hearing. Prob. Code § 687(b). [77th Leg., R.S., ch. 1174 ([H.B. 3144](#)), § 3, applicable only to an application for the appointment of a guardian that is filed on or after September 1, 2001.]

J. Powers of Guardian

1. Purchase Prepaid Funeral for Ward

A guardian may now apply to the court for an order permitting the guardian to purchase a prepaid funeral benefits contract for the ward. Prob. Code § 774(a)(7). [77th Leg., R.S., ch. 305 ([H.B. 1233](#)), § 1, effective September 1, 2001.]

2. Inspect Ward's Estate Planning Documents

To enable a guardian to do a better job of making tax-motivated gifts of the ward's property, the guardian may now apply to the court for an order seeking an in camera inspection of true copies of the ward's estate planning documents such as wills, codicils, and trusts. The court may appoint a guardian ad litem for the ward or any interested party at any stage of the proceedings if the court considers it advisable for the

protection of the ward or the interested party. Prob. Code § 865A. [77th Leg., R.S., ch. 217 ([H.B. 1132](#)), § 16, effective September 1, 2001.]

a. Application

The application must comply with the following requirements:

- be sworn to by the guardian,
- list all of the instruments the guardian wishes to inspect, and
- state one or more reasons supporting the necessity to inspect each requested document to assist the guardian in making tax-motivated gifts of the ward's property.

b. Notice

The guardian must send a copy of the application to the following persons:

- each person who has custody of an instrument listed in the application,
- the ward's spouse,
- the ward's dependents,
- all beneficiaries under a will, trust, or other beneficial instrument relating to the estate (Comment: How will the guardian know the identity of the beneficiaries if the guardian has not yet inspected the will or trust?), and
- any other person as the court directs.

Generally, the guardian must give the notice by certified mail. However, the guardian may give notice to each person who has custody of an instrument listed in the application either by registered or certified mail.

c. Hearing

The guardian may request a hearing on the application ten days after complying with the notice requirements. The guardian must give notice of the date, time, and place of the hearing to each person who has custody of an instrument listed in the application. If the court finds that there is good cause for an in camera inspection of the ward's estate planning document, the court will direct the document's custodian to deliver a true copy of the instrument to the court for an in camera inspection. The court

will then review the document and if good cause exists, the court will release all or part of the instrument to the guardian.

d. Attorney Protection

An attorney does not violate the attorney-client privilege solely by complying with a court order to release the ward's estate planning documents. The Supreme Court of Texas is prohibited from amending or adopting rules that conflict with this protection.

K. Arts and Entertainment, Advertisement, and Sports Contracts by Minors

Extensive new provisions detail how a guardian of the estate may seek court approval of an arts and entertainment, advertisement, or sports contracts for a minor. Prob. Code §§ 901-905. [77th Leg., R.S., ch. 799 ([H.B. 539](#)), effective September 1, 2001.]

1. Contracts Covered

The new provisions apply to the following types of contracts:

- Arts and entertainment contracts, that is, contracts under which (1) an artist (actor, musician, director, writer, cinematographer, composer, lyricist, dancer, choreographer, model, etc.) is employed or agrees to render services in a motion picture, theatrical, radio, television, or other entertainment production, or (2) a person agrees to purchase, secure, sell, lease, license, or otherwise dispose of literary, musical, or dramatic tangible or intangible property or any rights in that property for use in the field of entertainment, including a motion picture, television, the production of phonograph records [perhaps the legislators should visit music stores more often and recognize that compact disks and cassette have replaced records], or theater. Prob. Code § 901(3), (4).
- Advertisement contracts, that is, contracts under which a person is employed or agrees to advertise consumer goods or services. Prob. Code § 901(2).
- Sports contracts, that is, contracts under which an athlete is employed or agrees to participate, compete, or engage in a sports or athletic activity at a professional or amateur sports event or athletic event. Prob. Code § 901(6).

2. Procedure

The guardian of the minor's estate must petition the court to obtain approval of the contract. The court may not approve the contract unless the guardian provides to the other contracting party notice of guardian's petition and an opportunity to request a hearing. Each of the minor's parents is a necessary party to the action. The court may require the guardian to execute and file a written consent if the court decides to require a portion of the net earnings to be set aside as discussed in the next subsection. Prob. Code § 903.

3. Net Earnings Set Aside

The court may require that a portion of the net earnings (that is, the total amount received for the services of the minor under the contract less (1) taxes, (2) a reasonable sum for the support, care, maintenance, education, and training of the minor, (3) fees and expenses paid in connection with procuring the contract or maintaining employment of the minor, and (4) attorney's fees for services rendered in connection with the contract or any other business of the minor) be set aside and preserved for the minor's benefit in a § 867 trust (or similar trust created under the laws of another state). The amount to be set aside must be a reasonable amount as determined by the court.

4. Duration Limitation

The court may not approve a contract that binds the minor beyond the seventh anniversary of the date of the contract. Prob. Code § 902.

5. Effect of Approval

An approved contract is not voidable on the ground that the contract was entered into by a minor. Prob. Code § 902(d). The court's approval of the contract extends to the contract as a whole and any of the terms and provisions of the contract, including any optional or conditional provision in the contract relating to the extension or termination of its term. Prob. Code § 903(b).

6. Appointment of Guardian ad Litem

The court may appoint a guardian ad litem for a minor who has entered into one of these contracts if the court finds that the appointment of a guardian ad litem would be in the best interest of the minor. Prob. Code § 905.

L. Creditors

A unsecured claim of the ward may now be barred if the guardian gives the unsecured creditor notice and the creditor does not timely present the creditor's claim. The guardian of the estate may include in an unsecured creditor's notice a statement that the creditor must present a claim not later than the 120th day after the date on which the unsecured creditor receives the notice or else the claim is barred, if not earlier barred by the general statutes of limitations. The notice must include (1) the address to which the creditor may present the claim and (2) an instruction that the creditor file the claim with the clerk of the court issuing the letters of guardianship. Prob. Code §§ 784(e) & 786(a). [77th Leg., R.S., ch. 1174 ([H.B. 3144](#)), §§ 6-7, applicable only to an application for the appointment of a guardian that is filed on or after September 1, 2001.]

M. Compensation

1. Time at Which Guardian of Estate Entitled

If the guardian of the estate desires compensation, the guardian must apply to the court at the time the court approves an annual or final accounting. Prob. Code § 665(b). [77th Leg., R.S., ch. 953 ([S.B. 1417](#)), § 1, applicable to compensation that is authorized by a court on or after September 1, 2001.]

2. Amount of Compensation for Guardian of the Estate

A fee of five percent of the gross income of the ward's estate plus five percent of all money paid out of the estate is considered reasonable compensation for the guardian of the estate. Prob. Code § 665(b). The court may review and modify this amount if the court finds that the amount is unreasonably low when considering the services the guardian rendered. The court may make this review upon its own motion or on application of an interested person. Prob. Code § 665(c). The court may not find that the guardian's compensation using the normal 5% in-5% out commission is unreasonably low merely because this amount is less than the guardian's usual and customary charges. Prob. Code § 665(d) [77th Leg., R.S., ch. 953 ([S.B. 1417](#)), § 1, applicable to compensation that is authorized by a court on or after September 1, 2001.]

3. Source of Payment for Guardian of the Person

A guardian of the person's compensation may now come not only from the ward's estate but from "other funds available for that purpose." Prob. Code § 665(a). [77th Leg., R.S., ch. 217 ([H.B. 1132](#)), § 3, effective September 1, 2001.]

N. Expenses

1. Reimbursable Expenses

Rather than being encompassed by the generic phrase “all necessary and reasonable expenses,” attorney’s fees are now specifically listed as a reimbursable expense. The guardian is entitled to reimbursement from the guardianship estate for the payment of reasonable attorney’s fees which the guardian incurred with regard to the management of the ward’s estate or any other guardianship matter. Prob. Code § 666. [77th Leg., R.S., ch. 953 ([S.B. 1417](#)), § 2, applicable only to expenses the guardian incurs on or after September 1, 2001.]

2. Formalities

Expense charges no longer need to be entered on the claim docket; filing with the clerk is sufficient. Prob. Code § 667(3). Expense charges will be paid only if the payment is authorized by court order. Previously, the statute required the court to act on expense charges in the same manner as other claims against the estate. Prob. Code § 667(4). [77th Leg., R.S., ch. 953 ([S.B. 1417](#)), § 3, applicable only to expenses the guardian incurs on or after September 1, 2001.]

O. Removal of Guardian

Several revisions were made to provisions dealing with the removal of guardians. Prob. Code § 761. [77th Leg., R.S., ch. 217 ([H.B. 1132](#)), § 15, applicable only to a motion or complaint for the removal of a guardian made or filed on or after September 1, 2001.]

1. Removal Without Notice

The court may now remove a guardian without notice if the guardian cannot be served with process because the guardian is not a Texas resident and does not have a resident agent to accept service of process.

2. Removal With Notice

The court may now remove a guardian after citing the guardian with person service if the court determines that, because of the dissolution of the joint guardians’ marriage, the termination of the guardians’ joint appointment and the continuation of only one of the joint guardians as the sole guardian is in the ward’s best interest. If one joint guardian is removed, the other joint guardian is entitled to continue to serve as the sole guardian unless removed for a reason other than the dissolution of the joint guardians’ marriage.

P. Settling of Guardianships

Many provisions referring to the “closing” of a guardianship were changed to refer instead to the guardianship being “settled.” Prob. Code §§ 694G; 745, 747, 749. [77th Leg., R.S., ch. 484 ([H.B. 1037](#)), §§ 2-4, 6, applicable only to an application for the appointment of a guardian filed on or after September 1, 2001.]

Q. Termination of Small Guardianships for Minors

The maximum size of a minor’s estate which allows the guardianship to be terminated and the remaining assets paid to the county clerk was increased by three bills to different amounts from the original \$25,000. H.B. 1132 increased the amount to \$50,000. H.B.898 and H.B. 3144 increased the amount to \$100,000. Government Code § 311.025 provides that if amendments are irreconcilable, the amendment with the later date of enactment, based on the date on which the last legislative vote is taken on the bill enacting the statute, prevails. Accordingly, H.B.3144’s \$100,000 figure prevails. Prob. Code § 745(c). [77th Leg., R.S., ch. 127 ([H.B. 898](#)), § 1, applicable only to an application for the appointment of a guardian that is filed on or after September 1, 2001, passed Senate on May 3, 2001; 77th Leg., R.S., ch. 217 ([H.B. 1132](#)), § 13, applicable only to an application to close a guardianship which is filed on or after September 1, 2001, passed Senate on May 3, 2001; 77th Leg., R.S., ch. 1174 ([H.B. 3144](#)), § 5, applicable only to an application for the appointment of a guardian that is filed on or after September 1, 2001, passed Senate on May 22, 2001.]

R. Temporary Guardianships

1. Application for Appointment of Temporary Guardian

An application for the appointment of a temporary guardian no longer needs to contain the social security numbers of the applicant and the proposed ward. Prob. Code § 875(c). [77th Leg., R.S., ch. 217 ([H.B. 1132](#)), § 17, applicable only to an application for the appointment of a temporary guardian that is filed on or after September 1, 2001.]

2. Effect on Powers of Agent

The appointment of a temporary guardian will no longer automatically terminate the agent’s authority. Instead, the court has the discretion to suspend the agent’s powers until the term of the temporary guardianship expires. An interested party may still apply for and receive a temporary restraining order against the agent under other applicable law. Prob. Code § 485. [77th Leg., R.S., ch. 217 ([H.B. 1132](#)), § 1, applicable only to a durable power of attorney executed by a principal for whom an application for the appointment of a guardian is filed on or after September 1, 2001.]

S. Management Trusts

1. Persons Who May Apply for Creation of Management Trust

An incapacitated person's guardian ad litem may now apply to the court for the creation of a management trust. Under the prior version of the statute, only the ward's guardian or attorney ad litem could make the application. Prob. Code § 867(b). [77th Leg., R.S., ch. 994 ([H.B. 628](#)), § 1, applicable only to an application for the creation of a trust filed on or after September 1, 2001.]

2. Appointment of Non-Financial Institution as Trustee

Under certain circumstances, the court may appoint a person other than a financial institution to serve as the trustee of a management trust. These circumstances are as follows:

- The value of the trust's principal is \$50,000 or less and the court finds that the appointment of a person other than a financial institution is in the ward's best interests.
- The value of the trust's principal is greater than \$50,000 and the court finds that (1) no financial institution is willing to serve as trustee and (2) the appointment of a person other than a financial institution is in the ward's best interests. Note that before the court may find that no financial institution is willing to serve as trustee, the court must check any list of corporate fiduciaries located in Texas that is maintained at the office of the presiding judge of the statutory probate courts or at the principal office of the Texas Bankers Association.

Prob. Code § 867(c)-(e). [77th Leg., R.S., ch. 994 ([H.B. 628](#)), § 1, applicable only to an application for the creation of a trust filed on or after September 1, 2001.]

3. Bond

If a non-financial institution is serving as trustee of a management trust, the court must require the trustee to file with the county clerk a bond in an amount equal to the value of the trust's principal and projected annual income and with the conditions the court determines are necessary. Prob. Code § 868B. [77th Leg., R.S., ch. 994 ([H.B. 628](#)), § 3, applicable only to an application for the creation of a trust filed on or after September 1, 2001.]

T. Community Administration

1. Definition of “Community Administrator”

The term “community administrator” is now defined as “a spouse who is authorized to manage, control, and dispose of the entire community estate on the judicial declaration of incapacity of the other spouse, including the part of the community estate that the other spouse legally has the power to manage in the absence of the incapacity.” Prob. Code § 601(5). [77th Leg., R.S., ch. 217 ([H.B. 1132](#)), § 2, applicable only to the estate of a person for which a motion to judicially declare the person incapacitated is filed on or after September 1, 2001.]

2. Presumption of Competent Spouse’s Suitability

The competent spouse is now presumed to be suitable and qualified to serve as the community administrator. Prob. Code § 883. [77th Leg., R.S., ch. 217 ([H.B. 1132](#)), § 18, applicable only to the estate of a person for which a motion to judicially declare the person incapacitated is filed on or after September 1, 2001.]

3. Management of Incapacitated Spouse’s Separate Property

If an incapacitated spouse owns separate property, the court will now appoint the other spouse (or another person or entity in the normal order of precedence established in Probate Code § 677) as guardian of the estate to administer the incapacitated spouse’s separate property. The competent spouse may continue to manage the entire community estate even if the court appoints another person as guardian of the incompetent spouse’s separate property. Prob. Code § 883. [77th Leg., R.S., ch. 217 ([H.B. 1132](#)), § 18, applicable only to the estate of a person for which a motion to judicially declare the person incapacitated is filed on or after September 1, 2001.]

4. Delivery of Property by Non-Spouse Guardian

A non-spouse guardian for an incompetent spouse must deliver all community property to the competent spouse but now that delivery is required only if the spouse becomes the community administrator. Prob. Code § 884. [77th Leg., R.S., ch. 217 ([H.B. 1132](#)), § 21, applicable only to the estate of a person for which a motion to judicially declare the person incapacitated was filed on or after September 1, 2001.]

5. Duty to Inform Court of Lawsuits

A spouse who becomes a community administrator with the power to manage the entire community estate must now inform the court in writing of the following lawsuits which are filed by or on behalf of the spouse (community administrator):

- a suit for the dissolution of the marriage of the community administrator and that person’s incapacitated spouse, and
- a suit which names the incapacitated spouse as a defendant.

Prob. Code § 884A. [77th Leg., R.S., ch. 217 ([H.B. 1132](#)), § 22, effective September 1, 2001.]

6. *Accounting, Inventory, and Appraisement*

Extensive new provisions were enacted regarding the duty of a community administrator to account, prepare an inventory, and value all estate property. Prob. Code § 883B. [77th Leg., R.S., ch. 217 ([H.B. 1132](#)), § 19, applicable only to the estate of a person for which a motion to judicially declare the person incapacitated is filed on or after September 1, 2001.]

a. *Inventory and Appraisement*

The court on its own motion or on the motion of an interested person for good cause, may order a community administrator to file a verified, full, and detailed inventory and appraisement. The following property must be included in this inventory and appraisement:

- community property subject to the incapacitated spouse’s sole management, control, and disposition,
- joint management community property, and
- any income earned on the above two types of property.

The inventory and appraisement must be prepared in the same form and manner that is required of a guardian under Probate Code § 729. The community administrator must file the inventory and appraisement no later than 90 days after the court issues the order.

b. *Accounting*

The court must wait at least 15 months after the date that a community administrator’s spouse is judicially declared to be incapacitated before it may order an accounting. After the community administrator files his or first accounting, the court may order the community administrator to file subsequent periodic accountings at intervals of not less than 12 months. The court may order initial and subsequent accountings on its own motion or on the motion of an interested person for good cause. The following property must be included in this accounting:

- community property subject to the incapacitated spouse's sole management, control, and disposition,
- joint management community property, and
- any income earned on the above two types of property.

The accounting must be prepared in the same form and manner that is required of a guardian under Probate Code § 741 except that the accounting does not need to be filed annually with the county clerk. The community administrator must file the accounting no later than 60 days after the court issues the order.

7. *Removal of Community Administrator*

Comprehensive new provisions govern the removal of the community administrator. Prob. Code § 883C. [77th Leg., R.S., ch. 217 ([H.B. 1132](#)), § 20, applicable only to the estate of a person for which a motion to judicially declare the person incapacitated is filed on or after September 1, 2001.]

a. Motion and Notice

The court or an interested person may make the motion to remove a community administrator. The community administrator must be cited by personal service to answer at a time and place specified in the notice.

b. Grounds for Removal

The court may remove the community administrator for any of the following reasons:

- the community administrator fails to comply with a court order for an inventory and appraisal or an accounting,
- sufficient grounds appear to support the belief that the community administrator has misapplied or embezzled (or is about to do so) all or any part of the property committed to the community administrator's care,
- the community administrator is proved to have been guilty of gross misconduct or gross mismanagement in the performance of his or her duties,
- the community administrator (1) becomes incapacitated, (2) is sentenced to the penitentiary, or (3) becomes legally incapacitated from properly performing the community administrator's fiduciary duties.

c. Removal Order

The removal order must (1) state the cause of the removal and (2) must direct the disposition of the assets remaining in the name or under the control of the removed community administrator.

d. Expenses of Community Administrator's Defense

If the community administrator defends a removal action in good faith, the administrator is entitled to recover from the incapacitated spouse's part of the community estate the administrator's necessary expenses and disbursements in the removal proceedings, including reasonable attorney's fees. The community administrator may recover these expenses even if the defense is unsuccessful.

8. *Appointment and Rights of Attorney Ad Litem*

The court may appoint an attorney ad litem to represent the interests of an incapacitated spouse in any action, e.g., a proceeding for an accounting or to remove a community administrator. The attorney ad litem may demand an accounting or inventory and appraisal from the community administrator. The community administrator must comply with the attorney ad litem's demand within 60 days. The community administrator must prepare the accounting or inventory and appraisal in the form and manner which the attorney ad litem mandates. The attorney ad litem may require the community administrator to file these documents with the court. Prob. Code § 883D. [77th Leg., R.S., ch. 217 ([H.B. 1132](#)), § 20, applicable only to the estate of a person for which a motion to judicially declare the person incapacitated is filed on or after September 1, 2001.]

9. *Effect of Removal, Disqualification, or Unsuitability of Other Spouse*

Extensive provisions now govern the ramifications of the court removing the other spouse as community administrator or finding that the other spouse is disqualified or unsuitable. Prob. Code § 883. [77th Leg., R.S., ch. 217 ([H.B. 1132](#)), § 18, applicable only to the estate of a person for which a motion to judicially declare the person incapacitated is filed on or after September 1, 2001.]

a. Appointment of Guardian

If the court removes the competent spouse or finds that the competent spouse is disqualified or unsuitable to serve as the community administrator, the court will appoint a guardian for the incapacitated spouse's estate if the court has not already appointed a guardian of the estate for the incapacitated spouse's separate property (or, if the court had appointed the competent spouse as the guardian).

b. Delivery of Community Property to Guardian

The court may order the competent spouse to turn over up to one-half the community property which is subject to the spouses' joint management, control, and disposition to the guardian. The court must consider the financial circumstances of the spouses and any other relevant factors before making this order.

c. Powers of Guardian

The guardian of the incapacitated spouse has the authority to administrator the following property:

- the incapacitated spouse's separate property,
- community property which is subject to the incapacitated spouse's sole management, control, and disposition,
- joint management community property which the court ordered the competent spouse to turn over to the guardian, and
- any income earned by the above listed three types of property.

d. Powers of Competent Spouse

The competent spouse continues to have the authority to administer the following property even after the court removes the spouse as the community administrator or finds the spouse to be disqualified or unsuitable:

- the competent spouse's separate property,
- community property which is subject to the competent spouse's sole management, control, and disposition,
- joint management community property except for the portion which the court orders the competent spouse to turn over to the guardian, and
- any income earned by the above three types of property.

e. Impact on Support Duties and Creditors

The duties and obligations between spouses, including the duty to support the other spouse, and the rights of any creditor of either spouse are not affected by the manner in which these provisions and the court divide the administration of the community property.

10. Conforming Changes to Family Code

The Family Code provisions applicable to the management of marital property under unusual circumstances were amended to remove references to incapacitated spouses. Fam. Code §§ 3.301 & 3.307. [77th Leg., R.S., ch. 217 ([H.B. 1132](#)), §§ 23-24, applicable only to a proceeding in which an original petition is filed on or after September 1, 2001.]

The Family Code provisions providing for the sale of separate and community homesteads under unusual circumstances were amended to remove references to incapacitated spouses. Fam. Code §§ 5.101, 5.102, & § 5.103. [77th Leg., R.S., ch. 217 ([H.B. 1132](#)), §§ 26-28, applicable only to a proceeding in which an original petition is filed on or after September 1, 2001.]

Conforming changes were also made to Fam. Code § 5.002 & 5.003 [formerly § 5.107]. [77th Leg., R.S., ch. 217 ([H.B. 1132](#)), §§ 25 & 29, effective September 1, 2001.]

U. Payment of Claims Without Guardianship

The amount which a debtor of a minor or incapacitated person who does not have a guardian of the estate may pay to the clerk of the court was raised to \$100,000 from \$50,000. The legislature raised the amount for both Texas residents and nonresidents. Prob. Code § 887. [77th Leg., R.S., ch. 127 ([H.B. 898](#)), § 2, effective September 1, 2001; 77th Leg., R.S., ch. 1174 ([H.B. 3144](#)), § 8, effective September 1, 2001.]

V. Sale of Minor's Property Without Guardianship

The value of property which a parent of a minor may now sell upon court order without the necessity of being appointed as a guardian of the estate was raised to \$100,000 from \$50,000. Prob. Code § 889(a). [77th Leg., R.S., ch. 127 ([H.B. 898](#)), § 4 and 77th Leg., R.S., ch. 1174 ([H.B. 3144](#)), § 9, both applicable only to an application for the sale of an interest in property of a minor filed on or after September 1, 2001.]

W. Sale of Minor's Property by Guardian of the Person

The value of property which a guardian of the person may now sell upon court order with the necessity of being appointed as a guardian of the estate was raised to \$100,000 from \$50,000. Prob. Code § 890(b). [77th Leg., R.S., ch. 1174 ([H.B. 3144](#)), § 10 and 77th Leg., R.S., ch. 127 ([H.B. 898](#)), § 4, both applicable only to an application for the appointment of a guardian that is filed on or after September 1, 2001.]

X. Interstate Guardianships

1. Transfer of Texas Guardianship to Another Jurisdiction

A formal procedure now exists to transfer a Texas guardianship to another jurisdiction if the ward has permanently moved to that jurisdiction. The guardian of the estate or person must make a transfer application to the Texas court which has jurisdiction over the guardianship. Notice of this application must be (1) served personally on the ward and (2) be given to the court of the other jurisdiction to which the applicant wishes to transfer the guardianship. Although a formal hearing is not required, the court may conduct one upon its own motion or upon a motion of the ward or any interested person. The court will transfer the guardianship if (1) the court determines that the transfer is in the ward's best interests and (2) the court of the other jurisdiction accepts the transfer. The Texas court is required to coordinate efforts with the other jurisdiction's court to facilitate the orderly transfer of the guardianship. Prob. Code § 891. [77th Leg., R.S., ch. 479 ([H.B. 952](#)), § 1, effective September 1, 2001.]

2. Transfer of a Non-Texas Guardianship to Texas

A formal procedure now exists for a Texas court to receive and accept a guardianship established under the law of another jurisdiction if the ward already resides in Texas or intends to move to Texas.⁵ The guardian appointed by the foreign court begins the process by filing an application. Notice of the application must be (1) served personally on the ward and (2) given to the court of the other jurisdiction which is currently handling the guardianship. If applications are filed in more than one Texas court, the proceeding will be heard in the court where the first application was filed assuming venue is proper in that court. If the court does not have venue to hear an application, the court must transfer the proceeding to a proper court.

In reviewing the application, the court should determine that the proposed guardianship is not a collateral attack on an existing or proposed guardianship and that Texas courts are best suited to consider the guardianship. These determinations are not, however, mandatory. Although a formal hearing is not required, the court may conduct one upon its own motion or upon a motion of the ward or any interested person. The court will accept the foreign guardianship if the transfer is in the ward's best interests. (If, on the other hand, the Texas court denies the application, the guardian appointed by the other jurisdiction may still file an application to be appointed a guardian following the normal procedures). The Texas court must give full faith and credit to the provisions of the other jurisdiction's order regarding the determination of the ward's incapacity and

⁵ The statute actually provides that the guardian is to file the application "with a court in which the ward resides or intends to reside." I doubt that the legislature intended incoming wards to set up housekeeping in the probate court. It appears that the phrase "in the county" was omitted from the statute and that the language should indicate that the guardian files the application "with a court *in the county* in which the ward resides or intends to reside."

the rights, powers, and duties of the guardian. The Texas court is required to coordinate efforts with the other jurisdiction's court to facilitate the orderly transfer of the guardianship. No later than 90 days after granting the application, the court must hold a hearing to consider modifying the administrative procedures or requirements of the transferred guardianship in accordance with Texas law. Prob. Code §§ 892 & 893. [77th Leg., R.S., ch. 479 ([H.B. 952](#)), § 1, effective September 1, 2001.]

Y. Technical Corrections & Modifications

1. Probate Code § 601

The definitions of 26 terms and two construction rules were renumbered to accommodate the addition of a definition for “community administrator.” [77th Leg., R.S., ch. 217 ([H.B. 1132](#)), § 2, applicable only to the estate of a person for which a motion to judicially declare the person incapacitated is filed on or after September 1, 2001.]

2. Probate Code § 606

The language of this jurisdictional section was modernized and clarified. In addition, several existing subsections were re-lettered to accommodate the addition of new or reorganized material. Note, however, that several bills modified different parts of § 606 resulting in inconsistent lettering schemes. [77th Leg., R.S., ch. 63 ([H.B. 536](#)), § 2, applicable only to a proceeding that is instituted on or after September 1, 2001; 77th Leg., R.S., ch. 484 ([H.B. 1037](#)), § 1, applicable September 1, 2001.] Yet another bill changed the phrase “mental *illness* matters” to “mental *health* matters.” [77th Leg., R.S., ch. 1174 ([H.B. 3144](#)), § 1, effective September 1, 2001.]

3. Probate Code § 633

Several subsections of this notice section were renumbered to account for language changes by the 1999 Legislature and to better enumerate the persons who get mail notice of the filing of a guardianship application. [77th Leg., R.S., ch. 940 ([S.B. 869](#)), § 1, effective September 1, 2001, and 77th Leg., R.S., ch. 1174 ([H.B. 3144](#)), § 2, applicable only to an application for the appointment of a guardian that is filed on or after September 1, 2001.]

4. Probate Code § 665

Several subsections of this provision dealing the compensation of guardians were re-lettered to accommodate the addition and rephrasing of subsections (c) and (d). [77th Leg., R.S., ch. 953 ([S.B. 1417](#)), § 1, applicable only to guardian compensation authorized by a court on or after September 1, 2001.]

5. Probate Code § 694G

The amendment to this section regarding the restoration of a ward's capacity makes it clear that the settling and closing of the guardianship is in accordance with the entire guardianship chapter of the Probate Code rather than just § 745. [77th Leg., R.S., ch. 1174 ([H.B. 3144](#)), § 4, applicable only to an application for the restoration of a ward's capacity that is filed on or after September 1, 2001.]

6. Probate Code § 701

This section was amended to be consistent with changes to Probate Code § 682A(a) which prohibit a guardian from giving bond or taking the oath if the application for the guardianship of an incapacitated person is heard before the person's 18th birthday. Prob. Code § 701. [77th Leg., R.S., ch. 217 ([H.B. 1132](#)), § 11, applicable only to an application for the appointment of a guardian filed on or after September 1, 2001.]

7. Probate Code § 702(b)

The citation to the definition of "corporate fiduciary" was made less specific to account for numbering changes in Probate Code § 601, the definitional section. [77th Leg., R.S., ch. 217 ([H.B. 1132](#)), § 12, applicable only to the estate of a person for which a motion to judicially declare the person incapacitated was filed on or after September 1, 2001.]

8. Probate Code § 746

The heading of this section was expanded so that it now reads, "Payment of Funeral Expenses and Other Debts *on Death of Ward.*" In addition, the phrase "notwithstanding Section 745 of this code" was deleted from the text of the section. [77th Leg., R.S., ch. 484 ([H.B. 1037](#)), § 5, applicable only to an application for the appointment of a guardian filed on or after September 1, 2001.]

9. Probate Code § 752

The heading of this section was expanded so that it now reads, "Court Action; *Closing of Guardianship of Ward's Estate.*" [77th Leg., R.S., ch. 484 ([H.B. 1037](#)), § 8, applicable only to an application for the appointment of a guardian filed on or after September 1, 2001.]

10. Probate Code § 868(a)

This management trust provision was amended to reflect the possibility of a non-financial institution serving as the trustee. [77th Leg., R.S., ch. 994 ([H.B. 628](#)), § 2, applicable only to an application for the creation of a trust filed on or after September 1, 2001.]

11. Probate Code § 869A

This management trust provision was amended to reflect the possibility of a non-financial institution serving as the trustee. [77th Leg., R.S., ch. 994 ([H.B. 628](#)), § 4, applicable only to an application for the creation of a trust filed on or after September 1, 2001.]

12. Probate Code § 883A

The section regarding the termination of a community administrator's powers once the spouse regains capacity was reworded to enhance its clarity. [77th Leg., R.S., ch. 217 ([H.B. 1132](#)), § 19, applicable only to the estate of a person for which a motion to judicially declare the person incapacitated is filed on or after September 1, 2001.]

VI. MISCELLANEOUS

A. New Probate Courts

1. Collin County

Beginning in 2003, Collin County (McKinney) will have a statutory probate court. Gov't Code § 25.0451(b). [77th Leg., R.S., ch. 692 ([S.B. 194](#)), § 1, effective January 1, 2003.]

2. Hidalgo County

Beginning September 1, 2001, Hidalgo County (Edinburg) will have a statutory probate court. This court will result from a redesignation of County Court a Law No. 3 into the county's new statutory probate court. Judge Homero Garza will serve as the judge of this court until December 31, 2002 (and longer if reelected, of course). Gov't Code § 25.1101(b). [77th Leg., R.S., ch. 1211 ([H.B. 3696](#)), §§ 1 & 4, effective September 1, 2001.]

B. Statutory Probate Court Jurisdiction

Statutory probate courts now have jurisdiction over the following matters:

- refusal of a doctor to follow an advance health care directive;
- request for an order establishing a record of the person's date of birth, place of birth, and parentage;
- application for registration of a death;
- request for reimbursement of expenditures made by the state for the health care of certain individuals;
- request for the removal of a deceased person's remains;
- action regarding abandoned plots in private cemeteries;
- proceedings regarding the treatment of chemically dependent persons;
- actions under the Texas Mental Health Code; and
- actions under the Persons with Mental Retardation Act.

Gov't Code § 25.0021(b). [77th Leg., R.S., ch. 635 ([H.B. 689](#)), § 1, effective September 1, 2001.]

C. Practice of Law

Properly trained and certified employees and volunteers of an area agency on aging which is affiliated with the Texas Department on Aging may provide technical advice, consultation, and document completion assistance to clients with regard to certain disability planning documents without such conduct being deemed the practice of law without a license. The documents included within this exception include:

- medical powers of attorney;
- directives to physicians, and
- designations of guardian before the need arises.

Note that assistance with durable powers of attorney for property matters is still considered the practice of law and this exception does not apply. Gov't Code § 81.1011. [77th Leg., R.S., ch. 845 ([H.B. 1420](#)), § 1, effective September 1, 2001.]

D. Government Benefit Qualification

If a person is a beneficiary of a trust, certain Texas government benefits relating to mental health services are jeopardized under Health & Safety Code §§ 534.0175(a) & 552.018(a).. The value of the corpus of the trust which triggers disqualification was raised to \$250,000 from \$50,000. [77th Leg., R.S., ch. 1020 ([H.B. 1316](#)), §§ 1-2, effective immediately.]

E. Mutual Fund Accounts

Mutual fund accounts were added to the non-exclusive list of items which may contain transfer at death provisions. This change applies to a provision for the payment or transfer of a person’s interest in a mutual fund account on the person’s death regardless of when the provision was executed or the account was established. Prob. Code § 450(a). [77th Leg., R.S., ch. 284 ([S.B. 1640](#)), § 1, effective immediately.]

VII. APPENDICES

A. Declaration of Guardian by Surviving Parent

**DECLARATION OF APPOINTMENT OF GUARDIAN FOR MY CHILDREN IN
THE EVENT OF MY DEATH OR INCAPACITY**

I, _____, make this Declaration to appoint as guardian for my child or children, listed as follows, in the event of my death or incapacity:

_____	_____
_____	_____
_____	_____

(add blanks as appropriate)

I designate _____ to serve as guardian of the person of my (child or children),
_____ as first alternate guardian of the person of my (child or children),
_____ as second alternate guardian of the person of my (child or children), and
_____ as third alternate guardian of the person of my (child or children).

I direct that the guardian of the person of my (child or children) serve (with or without) bond.

(If applicable) I designate _____ to serve as guardian of the estate of my (child or children), _____ as first alternate guardian of the estate of my (child or children), _____ as second alternate guardian of the estate of my (child or children), and _____ as third alternate guardian of the estate of my (child or children).

If any guardian or alternate guardian dies, does not qualify, or resigns, the next named alternate guardian becomes guardian of my (child or children).

Signed this _____ day of _____, 20__.

Declarant

Witness

Witness

SELF-PROVING AFFIDAVIT

Before me, the undersigned authority, on this date personally appeared the declarant, and _____ and _____ as witnesses, and all being duly sworn, the declarant said that the above instrument was his or her Declaration of Appointment of Guardian for the Declarant's Children in the Event of Declarant's Death or Incapacity and that the declarant had made and executed it for the purposes expressed in the declaration. The witnesses declared to me that they are each 14 years of age or older, that they saw the declarant sign the declaration, that they signed the declaration as witnesses, and that the declarant appeared to them to be of sound mind.

Declarant

Affiant

Affiant

Subscribed and sworn to before me by the above named declarant and affiants on this ___ day of _____, 20__.

Notary Public in and for the
State of Texas

My Commission expires:

B. Declaration of Guardian Before the Need Arises

**DECLARATION OF GUARDIAN IN THE EVENT OF LATER INCAPACITY OR
NEED OF GUARDIAN**

I, _____, make this Declaration of Guardian, to operate if the need for a guardian for me later arises.

1. I designate _____ to serve as guardian of my person, _____ as first alternate guardian of my person, _____ as second alternate guardian of my person, and _____ as third alternate guardian of my person.

2. I designate _____ to serve as guardian of my estate, _____ as first alternate guardian of my estate, _____ as second alternate guardian of my estate, and _____ as third alternate guardian of my estate.

3. If any guardian or alternate guardian dies, does not qualify, or resigns, the next named alternate guardian becomes my guardian.

4. I expressly disqualify the following persons from serving as guardian of my person: _____, _____, and _____.

5. I expressly disqualify the following persons from serving as guardian of my estate: _____, _____, and _____.

Signed this ___ day of _____, 20__.

Declarant

Witness

Witness

SELF-PROVING AFFIDAVIT

Before me, the undersigned authority, on this date personally appeared the declarant, and _____ and _____ as witnesses, and all being duly sworn, the declarant said that the above instrument was his or her Declaration of Guardian and that the declarant had made and executed it for the purposes expressed in the declaration. The witnesses declared to me that they are each 14 years of age or older, that they saw the declarant sign the declaration, that they signed the declaration as witnesses, and that the declarant appeared to them to be of sound mind.

Declarant

Affiant

Affiant

Subscribed and sworn to before me by the above named declarant and affiants on this ___ day of _____, 20__.

Notary Public in and for the
State of Texas

My Commission expires:

C. Economic Contribution Examples⁶

1. Example 1

Husband comes into the marriage with a house with a fair market value of \$100,000 and he owes \$60,000. Husband and wife live in this house during the marriage and use community funds to pay off the debt. Then wife dies (and leaves her estate to her children by a prior marriage) and the house is worth \$300,000 and there is no debt. The community claim for economic contribution is \$180,000; one half of which passes to wife's estate.

⁶ The author expresses his great appreciation to Mr. Jerry Frank Jones for permission to reproduce these examples which originally appeared in Jerry Frank Jones, *2001 Legislative Developments – Starting All Over Again*, in 1 STATE BAR OF TEXAS, 25th ANNUAL ADVANCED ESTATE PLANNING & PROBATE COURSE ch. 3, at 21 (2001).

$$\$300K * (\$60K / (\$60K + 0 + \$40K)) = \$180,000$$

The statute allows wife's executor to apply for a lien to be imposed upon husband's property for \$90,000. The result is husband leaves the marriage with his separate property, subject to a \$90,000 lien.

2. Example 2

Same as above, but husband pays \$20,000 of the note with his separate property. Then the community claim for economic contribution is \$120,000; \$60,000 is payable to the wife's estate.

$$\$300K * (\$40K / (\$40K + 20K + \$40K)) = \$120,000$$

3. Example 3

Husband and wife live in wife's separate property home. During the marriage they spend \$30,000 community dollars to add a new room and a swimming pool. Immediately before these improvements the house is worth \$100,000. At the time of death the house is worth \$200,000. The community claim for economic contribution is \$46,153.85. The statute does not consider the value of the improvements at the time the marriage ends. Also, the initial equity is calculated at the time of the improvements, not at the date of the marriage.

$$\$200K * (\$30K / (\$30K + 0 + \$100K)) = \$46,153.85$$